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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-456

JOHN HILL, ATTORNEY GENERAL OF TEXAS, MARK WHITE, SECRETARY OF STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS, Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

MOTION OF COMMON CAUSE FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF OF COMMON CAUSE, URGING REVERSAL

DAVID CRUMP
2018 Timber Lane
Houston, Texas 77027

FRANK G. WALTERMIRE
2480 Two Shell Plaza
Houston, Texas 77002

Attorneys for Common Cause

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Common Cause, movant, hereby respectfully requests leave to file a brief amicus curiae urging reversal of the judgment of the district court. The interest of Common Cause is set forth in a section entitled "Interest of Amicus Curiae" in the brief annexed hereto.

All parties have consented to the filing of this brief amicus curiae by Common Cause. Common Cause participated in the district court by both briefs and oral argument.

An amicus curiae brief is desirable in this case because the statute attacked protects compelling state interests in the electoral process. It is one of many similar statutes in effect among the several states and the federal jurisdiction. Common Cause, because of its continuing interest in the election laws, may be able to aid the Court in developing the issues fully.

Respectfully submitted,

_____

David Crump
Attorney for Common Cause

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INTEREST OF AMICUS CURIAE

The Texas Campaign Reporting and Disclosure Act of 1973 puts into effect a disclosure system for election campaigns, designed to inform the public about the financing behind communications that influence votes. The Act contains requirements for public reporting of campaign contributions and expenditures. It also includes disclosure requirements for advertising aimed at influencing election votes, and it is these requirements, codified in Article 14.10(b) of the Texas Election Code, that are at issue here.

Amicus Curiae Common Cause is a nationwide citizen's lobbying organization whose main concern is the efficacy of political and electoral institutions within these United States. Common Cause helped draft the Texas Campaign Reporting and Disclosure Act and lobbied for its passage. The organization uses information provided through the Act in its regular activities. For example, Common Cause of Greater Houston, a local affiliate, has monitored spending and advertising in campaigns in Houston and has attempted to secure compliance, analyze disclosures, and pass information gained thereby to candidates and voters. The position of Common Cause is that Article 14.10(b) is essential to the purposes of the Texas Campaign Reporting and Disclosure Act and does not abridge Appellees' first amendment rights.

SUMMARY OF ARGUMENT

Article 14.10(b), the statute at issue here, serves crucial functions in securing fair elections. It allows the public to know who is behind the finances that influence votes, gives candidates an assurance of fair opportunity to reply to campaign charges, provides a first line of defense against campaign "dirty tricks," and allows rudimentary checking of financial disclosure reports. The providing of fair elections by such means as this is a fundamental duty of government and a compelling state interest. The statute, furthermore, is a disclosure law whose effects on speech are incidental and indirect. The decisions indicate that such a statute should be held constitutional.

Furthermore, Article 14.10(b) does not conflict with the decisions of this Court. Talley v. California, Appellees' case of

principal reliance, concerned a dragnet statute that required author identification on every handbill of whatever type wherever distributed. Article 14.10(b), by contrast, is limited in its coverage to an essential type of disclosure in a situation wherein the likelihood of adverse effects is at a minimum.

Article 14.10(b) will not prevent any candidate able to pay for printing from disseminating election advertising. The statute does not stop, censor, or burden speech; rather, it fits within the permissible category of reasonable "time, place and manner" regulations. It is also the least onerous alternative that will accomplish the fundamental goals at stake. The alternative "secret code,""central repository," "criminal libel," and "author-only" systems proposed by Appellees would in fact themselves be excessively onerous or unworkable.

Finally, Article 14.10(b) is not vague. The words it uses are words of common understanding and persons of ordinary intelligence can comply with it if they exercise common sense. If Appellees' complaint is that they see more than one reasonable way to comply with the statute, compliance in any reasonable way is sufficient under the decisions of this Court, and the statute is not thereby rendered vague.

I. THIS STATUTE, ARTICLE 14.10(b) SERVES FUNDAMENTAL GOVERNMENTAL INTERESTS IN SECURING FAIR ELECTIONS, AND IT SHOULD BE UPHELD UNDER THE CONTROLLING DECISIONS.

Article 14.10(b) does not simply ask disclosure for the sake of disclosure. It enacts a comprehensive plan that accompli-

shes an important state goal. Under Article 14.10(b), a person paying for election campaign advertising signs a copy of the advertising and leaves it with the printer, who retains it for one year. The signed copy must also contain a statement of the name of the candidate, committee or entity the payor represents. When the advertising is printed, it contains the name and address of the person paying as well as the name and address of the printer. The useful feature of Article 14.10(b) is that knowing the printer, any person can go the address of the printer, inspect the signed copy, and determine with some degree of certainty the source of the paid advertising. Even more importantly, if a piece of advertising is falsely attributed, the false attribution may, in most instances, be promptly exposed during the election.

A. This statute serves as Texas' first line of defense against the worst kinds of campaign "dirty tricks." It also serves many other purposes related to the preservation of democratic elections.

Article 14.10(b) allows a candidate to make fair reply to election advertising. Without this statutory requirement, there are frequently dozens of purportedly authoritative advertisements in any election campaign, making charges and claims about candidates without any indication of the persons behind the advertising or their motives. If the candidate can see from the face of the advertisement who has printed it, the Act allows that person to go to the printer, inspect the copy signed by the payor, and find out whom that person represents. Without the statute, candidates

would continue to do what they have done in the past: expend great amounts of their resources, use confidential informants, and resort to rumor to find out who is behind campaign charges, generally with little success.

A second result of this statute is that it better informs the public about the financing behind communications that influence its votes. Even more than the candidate, the voter is barraged with communications he or she is unable to evaluate quickly enough. The attribution clause requirements of Article 14.10(b), disclosing both the person paying and the printer, allows the voter some assurance that he knows the source or, alternatively, through the printer, facilitates identification of falsely attributed smears and enables the voter to evaluate them accordingly.

A third important function of Article 14.10(b) is that it is Texas' first line of defense against campaign "dirty tricks" of certain kinds. One of the worst kinds of "dirty tricks" is the falsely attributed smear, which works as follows: candidate X writes a smear of candidate Y that is outlandishly false and vicious, then distributes it under candidate Z's name. For example, hearings in the United States Senate have shown that Donald Segretti in Florida made sexual smears of Senators Humphrey and Jackson on stationery of Senator Muskie. Another of Segretti's efforts compared Governor Wallace to Hitler, adding a statement favoring massive school busing again attributed to Senator Muskie. These advertisements created a mud-slinging atmosphere in Florida's Democratic primary prior to the 1972 election, with the advertisers hoping that their rival party candidate would be aided. Article 14.10(b), had it been in effect, would have done one of two things: (1) id-

entified a printer through whom the advertising could have been traced or (2) caused the false attribution of the smears to be recognizable through the misidentification or nonidentification of the printer. Thus Article 14.10(b) decreases the feasibility and usefulness of the falsely attributed smear. Such dirty tricks have by no means been limited to the Segretti incident in Florida; every state, including Texas, has had an abundance of them.*

Besides allowing fair replies and limiting dirty tricks, the statute is related to the remainder of the Texas Campaign Reporting and Disclosure Act in significant ways. For example, it allows an approximate check of reported expenditures to be conducted. Organizations such as Common Cause will be able to trace and verify the actual advertising expenditures of candidates, which are the largest outlays in most campaigns. As a related purpose, Article 14.10 (b) provides the only tangible way in which

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* For descriptions of other celebrated "dirty tricks", see, e.g., N. Y. Times, Jan. 25, 1974, p. 1 col. 8 (Speaker and Majority Leader of New York Assembly prosecuted for flooding 12 electoral districts with falsely attributed literature); Record, United States v. Insco, 42 U.S.L.W. 2284 (M.D.Fla. 1974)(Insco, a 1972 Republican Congressional candidate, printed and distributed bumper stickers with "McGOVERN-GUNTHER" on them, then publicly attributed their origin falsely to Democratic opponent Gunther to link Gunther to the unpopular (in Florida) Democratic presidential nominee). The State of Texas should not be required to suffer such conduct without effective legislative response.

violations of the Act can be adequately investigated. If, for example, a candidate conspires with others to represent that his campaign contributions and expenditures are less than they actually were, the thorough investigation of advertising expenditures, which are the largest portion of any campaign, may be impracticably difficult without the names and addresses of printers to identify amounts received.

A sixth purpose of this advertising disclosure requirement is that organizations and opposing candidates may be able to estimate election eve expenditures by candidates. The last report required by the Texas Act is ten days to seven days before each election. This time limit is carefully calculated to avoid undue burdens on candidates, allow public discussion before the election, and include many expenditures; but in the usual election the period that is ten days to a week before the election is the period of mot heavy expenditures and prior disclosures of finances may seriously understate them.

Seventh, a legitimate reason for the designation of the payor and printer is the same as that for the disclosure of contributions and expenditures themselves. The voting public has a right to discover what companies are being paid by whom to print advertising for candidates and political committees. Furthermore, if the candidate complies with the law, the printer's name will eventually become public record anyway, through the candidate's own financial disclosure statement when it is filed, since that statement is required to give the name and address of all persons to whom expenditures are made by the candidate.

Finally, this statute enacts a uniform simple way in which candidates can make disclosure. Many conscientious candidates will

desire to make disclosure on their advertising, and Article 14.10(b) can be expected to achieve public acceptance for the practice, making it easy for conscientious and non-conscientious candidates both.

B. The purposes served by Article 14.10(b), including those enumerated above, constitute compelling state interests.

The decisions indicate that the providing of fair elections, as this statute does, is a governmental interest of the highest order. For example, in Jeness v. Fortson, 403 U.S. 431 (1971), this Court considered the constitutionality of a Georgia statute requiring minority candidates to get signed petitions with five percent of voters' names in order to get on the ballot. Even though such a statute would freeze out some minority candidates, this Court held that the governmental interest in making ballots orderly, so that the public can make sense out of the candidacies it examines, justified the statute and made it constitutional. Article 14.10 (b) serves the same kind of interests in a more fundamental way, and its impact is far less adverse to minority candidacies.

More recently, this Court's decisions in Brown v. Storer, 42 U.S.L.W. 4440 (1974); Lubin v. Panish, 42 U.S.L.W. 4453 (1974); and American Party v. White, 42 U.S.L.W. 4453 (1974) have re-emphasized the importance of the governmental interests at stake here. Brown v. Storer,particularly, involved a California law that disallowed candidacies of persons who had been members of another party within the preceding twelve months. The law was designed to prevent confusion and deception in the form of "stalking horse" candidacies, as well as

ballot proliferation. This Court stated that the law served "an important state interest . . . in avoiding confusion, deception and even frustration of the democratic process . . . . A state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidates." By enacting Article 14.10(b), Texas has attempted to serve the same important state interest in a way that does not prevent anyone's candidacy.

Brown v. Storer also emphasizes the passage of the Constitution that allows States to regulate the "Times, Places and Manner of holding Elections," and states that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democractic process." 42 U.S.L.W. at 4442 (emphasis added). The sole purpose of Article 14.10(b) is fair, honest elections. Article 14.10(b) is more closely related to that goal, indeed, than was the California law in Brown. The United States Constitution guarantees Texas a republican form of government--not an oligarchic one that can be won by excessive unattributed spending or an anarchic one in which dirty tricksters purposefully conceal from voters the pressures that influence their votes. In enacting Article 14.10(b), Texas has done nothing but attempt to safeguard the republican form of government for itself.

It is not only in recent decisions that the Court has recognized the legislature's extensive authority to enact regulations inhibiting unfair or fraudulent election practices. In characterizing this legislative authority, Chief Justice Hughes once said that it included:

". . . authority to provide a complete code for congressional elections, not only as to times and places but in relation to notices, registration, supervision and voting, protection of votes, prevention of fraud and unfair practices, counting of votes, duties of inspectors, canvasses, and publication of election returns; in short, to enact the numerous requirements to procure the safeguards which experience shows are necessary in order to protect the fundamental rights involved."

Smiley v. Holm, 285 U.S. 355, 366 (1932)(emphasis added). A year later, in Burroughs v. United States, 290 U.S. 534, 545 (1933), the Court stated as follows:

"To say that Congress is without power to pass appropriate legislation to safeguard such an election form the proper use of money to influence the result is to deny the nation in a vital particular the power of self protection. Congress undoubtedly possesses that power, as it possesses every other essential to preserve the departments and institutions of the general government from impairment whether threatened by force or corruption."

With these words, the Court upheld as constitutional the financial disclosure requirements of the Federal Corrupt Practices Act, requirements analogous to those in Article 14.10(b). Thus the decisions, past and present, indicate strongly that the statute at issue here serves a "fundamental" and "compelling" state interest in safeguarding the democratic election process.

C. Reasonable disclosure requirements such as those codified by Article 14.10(b) can and

should be used to further the compelling state interest of protecting the electoral process.

When, as here, a compelling state interest is at stake, it is appropriate for the state to use a reasonable disclosure law to accomplish its legitimate purposes. An examination of the controlling cases leaves little doubt that the assurance of fairness by the means used in Article 14.10(b) is a sufficiently strong interest to justify limited disclosure requirements. Indeed, disclosure laws have been upheld as constitutional and necessary in protecting interests that do not appear to be as fundamental as those at stake in the electoral process here.

For example, in Branzburg v. Hayes, 408 U.S. 665 (1972), three newspaper reporters were asserting a constitutional right of speech and association which they claimed protected them from compelled disclosure of confidential news sources before a grand jury. This Court, in rejecting the claim, stated its reason thus:

"As we have indicated, the investigation of crime by a grand jury implements a fundamental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony . . . 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.'"

403 U.S. at 680-81, 700. The Court concluded, "On the record before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but

uncertain, burden on news gathering that is said to result. 408 U.S. at 690.

In the case at bar, the effect on speech, if any, is far less perceptible than in Branzburg, which may cause reporters to be unable to tap a variety of news sources because of potential disclosure. On the other hand, the function of providing fair elections is, if anything, even more fundamental a function of our government than law enforcement. Thus Branzburg v. Hayes indicates that Article 14.10(b) should be upheld.

There are many other cases that similarly indicate that the statute should be upheld. Thus in United States v. Harriss, 347 U.S. 612 (1954), this Court considered the constitutionality of the Federal Regulation of Lobbying Act, which required lobbyists to disclose to the Congress their names together with their employer's names, together with their pay and expenses. The lower court had held the Act unconstitutional under the First Amendment, but this Court reversed with the following words:

> "Present day legislative complexities are such that individual members of Congress cannot be expected to explore the pressures to which they are regularly subjected . . . .
>
> "Congress has not sought to prevent these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation . . . .
>
> "The hazard of [first amendment] restraints is too remote to require striking down a statute which on its face is otherwise too plainly within the area of congressional power and is designed to safeguard a vital national interest."

347 U.S. at 625-26. A lobbyist hired by an employer to influence Congressional votes as

in Harriss is in a position analogous to that of the advertiser hired by a candidate to influence votes of the electorate in the case at bar. All the Texas statute at issue here does is ask "a modicum of information" for the public, which is in more dire need of it even than Congress.

More recently, in California Bankers Ass'n v. Shultz, 42 U.S.L.W. 4481 (1974), this Court held that the Bank Secrecy Act was constitutional. The Court's opinion begins by recognizing the substantial disclosures required by the Act:

> "[T]here is no denying the impressive sweep of the authority conferred on the Secretary of the Treasury by the Bank Secrecy Act of 1970. While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolates, cheese and watches as symbols of the Swiss economy."

42 U.S.L.W. at 4481. In the case at bar, this Court could recognize that persons from an earlier era did not live to see the time when dirty tricks became the symbol of certain aspects of elections.

The Bank Secrecy Act was challenged in California Bankers on many grounds. The Court declined to rule on some of the plaintiffs' first amendment arguments, but as to others the Court expressly held that the associational privacy and anonymous speech cases "do not elicit a per se rule that would forbid such disclosure where the governmental interest would override the associational interest in maintaining such confidentiality." 42 U.S.L.W. at 4492.

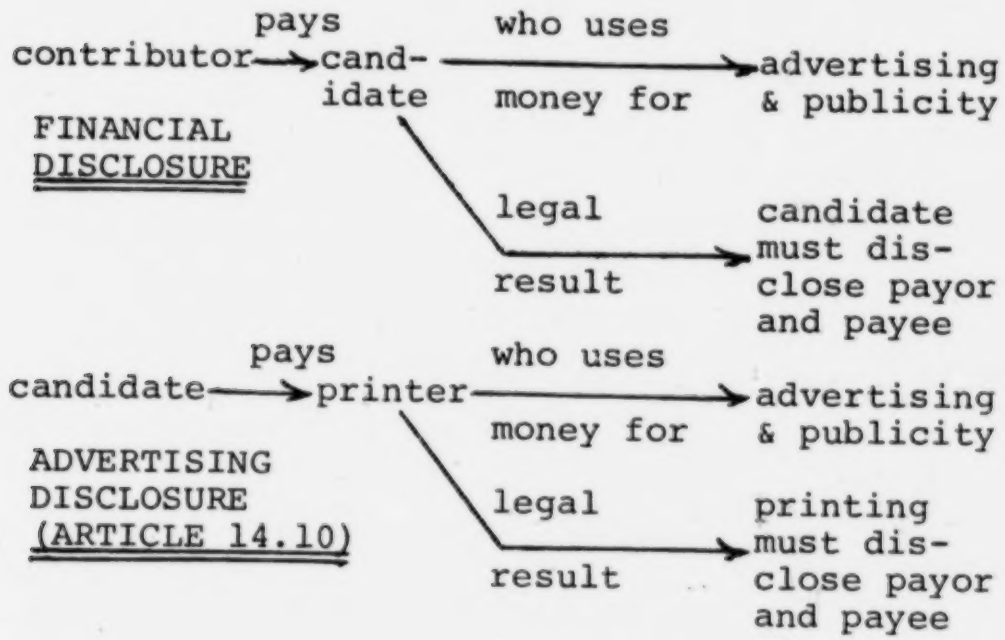
In addition to these cases, there is a mass of other decisions indicating that disclosure laws are proper legislative enactments to advance sufficiently strong governmental

interests. See, e.g., Lewis Pub. Co. v. Morgan, 229 U.S. 288 (1913)(requirement that newspapers contain statement of ownership, management and circulation is constitutional); Veterans & Reservists for Peace in Vietnam v. Comm'r, 459 F.2d 676 (3d Cir. 1972)(Trading with the Enemy Act, requiring licensing and consequent loss of associational privacy of persons importing materials protected by the First Amendment, is constitutional); S.E.C. v. Wall Street Transcr. Corp., 422 F.2d 1371 (2d Cir. 1970) (Investment Advisers Act, construed to require newspaper publishers to make disclosures for protection of public, is constitutional); Powe v. Miles, 407 F.2d 73 (4th Cir. 1968)(college campus rule requiring disclosure in advance of any "demonstration" is constitutional); Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966)(Labor-Management Reporting and Disclosure Act, which requires that attorneys engaged in "persuader" activities disclose publicly their associations with employer clients to avoid labor spies, espionage and deceptive persuasion, is constitutional). The statute at issue here enacts an extremely narrow kind of disclosure to meet a governmental interest of the highest order, and under the cases it falls within the category of proper legislation.

D. Article 14.10(b)'s requirements are the exact parallel of disclosure requirements addressed to campaign contributions and expenditures and do no more than ascertain what financial pressures influence votes.

Article 14.10(b) is exactly parallel to laws requiring disclosure of campaign contributions and expenditures. All it does is require disclosure surrounding payments that go to printers for printing election advertising.

In diagrammatic form, the similarities between financial disclosure of contributions and Article 14.10(b) could be expressed thus:



In other words, Article 14.10(b) is similar to financial disclosure of contributions in that it traces payments of money influencing votes. Indeed, if the candidate complies with the campaign contribution disclosure law in Texas, the printer's name and address will ultimately become public record as part of the candidate's own separate expenditure disclosures.

It is submitted that a disclosure law having this effect is constitutional. In Burroughs v. United States, 290 U.S. 534 (1933) and United States v. Harriss, 347 U.S. 612 (1954), similar laws were upheld against constitutional attacks.

E. Article 14.10(b) protects First Amendment rights, including the rights of candidates and their supporters to campaign in a fair election and the right of voters to vote

in a fair election.

Beyond its efficacy in protecting fundamental governmental interests, Article 14.10(b) has an additional and independent justification in that it supports First Amendment rights of individuals in the elective process. Candidates have a right to campaign in a fair, democratic election, and their supporters have a right to be able to support them in such an election. These rights have a First Amendment basis. Bullock v. Carter, 405 U.S. 134 (1971); Hadnott v. Amos, 394 U.S. 358 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

Article 14.10(b) advances these rights because it provides a candidate in an election with the kind of information the Harriss case said Congress ought to have with reference to lobbyists. It provides a way that a candidate can publicly deal with the dirty trick of the falsely attributed smear. The statute is rendered all the more necessary by the fact that time in an election is limited. Without this Texas statute, the candidate could expend heavy resources to investigate a smear and perhaps would only be able to make some response after the election. Post-election investigation does not help the candidate to exercise First Amendment rights where they count, in the election itself. Article 14.10 is designed to function during the election.

The voting public also has First Amendment rights in an election campaign. Williams v. Rhodes, supra, Jeness v. Little, Brown v. Storer and American Party v. White, supra, all indicate by implication that the voter has a right to an election free of deceptive practices. significantly, this right of voters to a fair election was not an issue in Talley v. California, Appellees' case of principal reliance.

II. THIS STATUTE DOES NOT VIOLATE THE DECISIONS OF THIS COURT CITED BY APPELLEES.

A. There is no conflict between Article 14.10(b) and the principles of Talley v. California.

Appellees state in their complaint that they rely "particularly" on Talley v. California, 362 U.S. 60 (1960), which they assert is "directly on point". Complaint, Paragraph VI. It is respectfully submitted, however, that the principles announced in Talley, do not cover the kind of statute involved in the case at bar.

Talley was never intended to mean that all disclosure laws are unconstitutional. Indeed, Talley must be read in the context of the many decisions that have upheld disclosure laws against claims such as those of Appellees here. A few of these decisions, from Harriss to California Bankers, are cited above. But even beyond the many reported cases upholding disclosure, Talley must be read in the context of the countless instances in which disclosure requirements are so obviously necessary and proper that the question of their constitutionality never arises. An example close at hand is provided by the Rules of this Supreme Court.

Rule 39 of the Rules of this Court requires that each printed document filed with this Court bear the name of the filing attorney and his address, together with the name of the party he or she represents. These names become public record and are printed with the published opinions of the Court. The reason for Rule 39 is clear: the Court needs to know which party is given brief has come from in order to understand it, and the Court also needs to know the name and address of an attorney to whom it can

direct notices and inquiries (if only so that the Court may assure itself that impostors are not filing papers without a party's authorization).* Likewise, Article 14.10(b) simply seeks to discover the source of election advertising and to locate an address to which persons may go to ascertain with reasonable certainty who has promulgated it, in a situation in which the frequency of impostors' dirty tricks is alarmingly high. Article 14.10(b) does not offend the Talley principle any more than does Rule 39.

Furthermore, a reading of Talley itself shows that the decision is not intended to make every disclosure law unconstitutional. The statute at issue in Talley was not concerned with election campaigns or with the integrity of any governmental process. It was simply a dragnet statute that covered every kind of printed communications that anyone in any circumstances might want to distribute. This Court quoted the broad language of the California statute in Talley as covering "any handbill, in any place, under any circumstances." Understandably, the Court found that the governmental interest in this broad disclosure was so slim as to be nonexistent. The Court stated its holding thus: "There are times and circumstances when the States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." 362 U.S. at 65 (emphasis added). Thus Talley stands for the proposition that there exists a right of nondisclosure in communications unless the government can show that it is requiring the disclosure in good faith to serve an important legitimate purpose.

*In addition to disclosure on all documents filed, this Court requires initial background disclosures from every attorney who applies to become a member of the Bar of this Court. For example, an applicant must disclose his employment and the name and address of every firm with which he has been associated. These requirements are also an example of disclosure necessary to maintain the integrity of a governmental process, and they do not conflict with Talley v. California.

Furthermore, there are other strong indications, besides the facts and holding of the case, that show that Talley was never intended to cover the case at bar. The dissent in Talley, for example, pointed out that the decision did not affect certain recognized disclosure requirements, including statutes "forbidding the distribution of anonymous publications with reference to political candidates." 362 U.S. at 70. The majority opinion in Talley indicates that Talley must be read in connection with such earlier cases as NAACP v. Alabama, 357 U.S. 449 (1958). In that case, the Court utilized a principle protecting anonymity because Alabama was acting in bad faith, with no valid interest, to harass the NAACP and its members. In short, Talley and NAACP v. Alabama do establish a principle of anonymity where the government's interest in requiring disclosure is improper or insufficient, but that does not mean that disclosure can never be required when, as here, the State can show good faith efforts to protect a fundamental interest. Compare, e.g., Baird v. State Bar, 401 U.S. 1 (1979) (State may not require disclosure of bar candidates' Communist party affiliations to harass suspected Communists) with LSCRRC v. Waldmond, 401 U.S. 154 (1971) (another state bar's good faith investigation of bar candidates through reasonable disclosure requirements held constitutionally permissible).

Although this Court has never ruled on the constitutionality of a statute like 14.10(b), a number of other courts have so ruled. The federal counterpart to Article 14.10, which is 18 U.S.C. §612, has been considered and upheld twice since the Talley decision. The reasoning of these two federal district courts was that the statute in Talley was a broad one, covering all handbills, while section 612 applies only to statements about candidates in elections. United States v. Insco, 42 U.S.L.W. 2284 (M.D.Fla. 1974); United States v. Scott, 195 F.Supp. 440 (D. N.D. 1961). A number of state courts have also held statutes similar to Article 14.10 (b) constitutional. See, e.g., Ex parte Hawtorne, 116 Fla. 608, 156 So. 619 (1934); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1934); State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922); see also Commonwealth v. Acquaviva, 187 Pa. Super. 550, 145 A.2d 407 (1958); but see ex parte Harrison, 212 Mo. 88, 110 S.W. 109 (1905); New York v. Duryea, 42 U.S.L.W. 2420 (N.Y. S.Ct. 1974) (currently on appeal in New York courts).*

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* Because of Appellees' reliance on Duryea in the district court Appellees would call this Court's attention to that decision also. The facts were a picturebook example of the worst kinds of campaign dirty tricks on a massive scale. See N.Y. Times Jan. 25, 1975, p.1 col.8. The Court, while holding that Talley rendered the New York disclosure statute unconstitutional, stated that "the compelling state interest that would underlie such a statute has never been more obvious." The court then went on to suggest that the legislature might meet this interest by passing laws (1) "preventing ethnic, racial or religious slurs;" (2) limiting "attacks on the purely personal character of a candidate;" and (3) deterring

Appellees cite the language of Talley which explains the need for anonymity of John Lilburne and Thomas Paine in view of government persecution of political writers. Article 14.10(b), however, does not apply to anything other than issues and candidacies which the government has already, by definition, placed on the ballot for the express purpose of having the public vote upon them. It should not be assumed that the government will use disclosures to persecute writers when the government has formally opened public debate on the subject by setting up an election. Thus while there is no question that the writers mentioned in the Talley opinion should remain anonymous, Article 14.10(b) does not affect their writing outside elections and does not contain the dangers that were inherent in the California statute at issue in Talley.

B. There is no conflict between the Texas statute at issue here and the principles of Miami Herald Pub. Co. v. Tornillo.

Appellees also have relied upon this Court's decision in Miami Herald Pub. Co. v. Tornillo, 94 S.Ct. 2831 (1974), in which this Court struck down the Florida equal space right-of-reply statute. Article 14.10 (b), however, is poles apart from the law at issue in Tornillo, which told newspaper

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"falsehoods" in elections. It is submitted that the Duryea opinion points eloquently to the need for Article 14.10. The alternatives proposed by that Court to meet the "obvious" compelling state interest would all be extremely harmful to the cause of free speech in an election.

editors to print complete political messages in a form, size and location dictated by the government whenever a newspaper criticized a candidate in an election. Mr. Chief Justice Burger referred to the Florida statute as "an intrusion into the function of editors." Article 14.10(b), by contrast, requires only that the printer and purchaser put their names on election advertising, in much the samemanner and for much the same reasons as court rules require that attorneys' and parties' names appear on briefs submitted to a court. The identification thus made does nothing to interfere with the "function of editors," nor does it dictate in any way what the message is to be.

For these reasons, the case at bar seems controlled not by Tornillo but rather by such decisions as Lewis Pub. Co. v. Morgan, 229 U.S. 288 (1913), which upheld the federal law requiring public identification of ownership, management and circulation in newspapers. The Miami Herald Publishing Company, for instance, was (and still is) required to label every newspaper issue with such a statement, which is the exact counterpart of Article 14.10(b) here; but this identifying statement was not the newspaper's complaint at all in Tornillo, nor did the case have anything to do with the requirement. Such a statement of identification does not affect the content of the message itself, does not involve the government in any discretionary decisions regarding message content, and does not necessitate any "intrusion into the function of editors."

III. ARTICLE 14.10(b) DOES NOT STOP, CENSOR OR OTHERWISE CURTAIL THE LIBERTY OF THE PRESS AND DOES NOT ABRIDGE THE RIGHT OF ASSOCIATION.

A. Minority party candidates will not be adversely affected by Article 14.10(b). If they are able to get onto the ballot, and if they are able to pay for advertising printing, there are numerous printers available to print their campaign literature.

One of the arguments advanced by Appellees and amici curiae supporting them is that Article 14.10(b) will mean that minority parties will not be able to secure printers to print their campaign advertising. The argument is that printers will be so abhorrent of having their company identification printed on the literature of a political party that they will uniformly refuse to accept payment, and there will be no way in which the literature from such sources can be physically produced, all as a result of Article 14.10(b). In evaluating this argument, one should realize that it represents the worst-case speculation of attorneys; there has been no case presented of a candidate who is on the ballot, who has money to pay for printing, and who has been unable to secure printing as a result of Article 14.10(b)* It is submitted, furthermore, that it is unlikely there will ever be such a case in the future.

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*For this reason, the argument of Appellees here set forth not only appears lacking in merit; it could also be argued that this particular claim does not present a justiciable question. There is no concrete injury or imminent threat of injury to any minority candidate on this record. Under the principles announced in California Bankers, supra, as well as O'Shea v. Littleton, 94 S.Ct. 669 (1974), it may well appear that the

This argument of Appellees underestimates the number of printers that are available and the nature of the printing industry. In Houston, Texas, alone, there are eight pages of printers listed in the Yellow Pages. There are more in Dallas, Austin, Fort Worth, San Antonio, Amarillo, and for that matter in the little towns of Texas such as Corsicana, Sealy, San Angelo and Cuero. These printers are not a monolith; they are of all social classes, all races, all religions, all political persuasions, all sizes of operation. All need business to survive economically. The industry is highly competitive on the level that is relevant to this inquiry, and are relatively low.

Furthermore, before coming to the printer a candidate must be able to afford to purchase advertising. Contributions received will have to be publicly disclosed under another section of the Texas Campaign Reporting

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constitutional requirement of a case or controversy is lacking. Further, Appellees may lack standing to present those claims, which would seem to be more properly asserted by parties who would be the ones who would suffer theclaimed injury if it occurred. Nor is this an instance in which standing to assert jus tertii would appear appropriate, because there is no reason why a truly injured minority party or candidate could not sue for itself. Cf. In re Lifscutz, 2 Cal. 3d. 415 (1970) (rejecting claim of jus tertii-based standing in disclosure situation). Common Cause does, however, believe that final determination of Appellees' claims would benefit the electoral process if such a determination here does not impose upon this Court's jurisdictional requirements.

and Disclosure Act (as will the fact of the expenditure made to the printer). In addition, the candidate will have to have succeeded in getting on the ballot; in Texas, for a statewide office, Article 13.45 requires in excess of 30,000 signatures on nominating petitions for new parties. See American Party v. White, supra. The argument that a serious candidate or ballot proponent who meets these requirements will not be able to get printing under these conditions is unduly pessimistic.

Indeed, if the argument of the Appellee in this respect were correct, the result would be that the way would be paved for an enterprising new printer to enter the business. Such a printer could enter the business, under the name "Minority Party Printing Co.," and notify minority parties throughout the state who are, by assumption, unable to get any other printer to accept payment for printing. Such parties--from Raza Unida Party to the American Party to the Socialist Workers Party--generate significant printing requirements. The new printer would only have to comply with Article 14.10(b) by printing "Minority Party Printing Co.," together with the firm address and the name of the advertising purchaser. This "new" printer already exists--in the persons of the thousands of printers who are already printing, many of whom would like to receive payment for printing from minority parties.

The attribution required by Article 14.10(b) need not be of any particular size or in any particular location. It may, and as a matter of current practice frequently does, appear in an inconspicuous place, accompanied by an explanation that the attribution is "required by law" or "required by the Texas Campaign Reporting and Disclosure Act." Such a modest requirement will not render minority parties unable to find any printer

in the State of Texas unwilling to accept payment for advertising.

B. To the extent that the Appellees' claims are commercial in nature, those claims are not protected by the First Amendment.

Appellees' complaint seeks protection for Appellees' "Business associations and dealings . . . or loss of revenues . . . ." Complaint, paragraph 9e. At oral argument in the district court, Appellees fleshed out this claim by an example: one printer was engaged in printing advertising for proponents of liberalized gambling laws at the same time as the printer was printing anti-gambling literature related to an upcoming election for the Baptist Church, and this printer feared that he might lose revenues as a result of Article 14.10(b) since one or the other customer might go to another printer.

This interest of the printers in maintaining business from conflicting clients so as to increase revenues which might otherwise go to other printers is not an interest protected by the First Amendment. The First Amendment is concerned not with who does the commercial task of printing but rather with the matter of getting the message of the speaker into the marketplace. Pittsburgh Press Co. v. Human Relations Comm'n, 41 U.S.L.W. 5055 (1973), indicates that commercial interests as such do not fall within the protection of the freedom of speech. Furthermore, it has long been the rule that economic effects on the communications media are not violations of the First Amendment, and this principle holds true even if there is an incidental effect on speech. E.g., Lorain Journal Co. v. United States, 342 U.S. 143 (1952) (antitrust laws applied to a newspaper do not violate the First Amendment, even though they may change the nature of press coverage); Oklahoma Press Co. v. Walling, 327 U.S. 186 (1946) (application of the Fair Labor Standards Act to the newspaper business is not unconstitutional even though the Act clearly makes reportage more expensive, may bankrupt marginal operations and increases difficulty of covering heavy news days by limiting work hours). Of course, these cases do not indicate that the mere fact of payment takes speech out of the First Amendment, and Common Cause is not arguing that there are no other First Amendment issues here. It is submitted, however, that to the extent that Appellees argue that they should be able to prevent customers from going to other printers, Appellees are urging a commercial interest not protected by the First Amendment.

C. Even if a "least-onerous alternative" test is applied here, Article 14.10(b) passes constitutional muster. It is the least onerous practicable method that will achieve the fundamental purposes at stake.

There is always a temptation for a person reading a statute to think upon first glance that it would be easy to write something better. Thus Appellees, in their Motion to Affirm, suggest a number of different ways in which they would like the legislature to have written Article 14.10(b). It is respectfully submitted that none of these proposals would adequately meet the statutory goals, and several of Appellees' proposals would themselves be oppressive to the First Amendment freedoms.

(1) The suggestion of a "secret code" system.

Appellees suggest that a secret code number could be assigned by the state to each printer who applied for one. Appellees proposed that each printer be required to place that number on all advertising. Interested citizens could then call the government and find out the name and location of the printer from the code number so that they could go to that address to inspect the signed copy of the advertising required by 14.10(b).

One basic trouble with such a system is that it would require a printer to register with the State before printing anything. The Texas legislature cannot be faulted for believing that the decisions of this Court, such as Thomas v. Collins, 323 U.S. 60 (1945), rendered such a prior registration scheme unconstitutional. Beyond its unconstitutionality, such a scheme poses practical difficulties: it would require a campaign advertising printer operating out of his garage with a mimeograph machine to register with the government and get a number before printing.

Finally, a system that requires the citizen to initiate a request for secret information is illogical. The secret code proposal implies that the citizen has a right to get the information but imposes a barrier for no other reason than to make it more difficult for him or her to get it, even though analysis of this kind is essential to the purposes of the Texas Campaign Reporting and Disclosure Act.

(2) The suggestion of a central government respository in which printers would be required to file all election advertising.

Appellees have also suggested that Article 14.10(b) could be rewritten to require that a copy of each piece of campaign

literature be filed with a government repository, together with the printer's name. An interested citizen could then travel from his home to inspect the filed copy and discover the printer's name and address.

This proposal suffers many of the same legal and practical difficulties that are presented by the secret code proposal. First, the question arises: least onerous for whom? A central repository system would render it more expensive and difficult for candidates and citizens to learn the sources of campaign literature and trace it to verify it. Delays occasioned by retrieval also would leave insufficient time for analysis before an election. Furthermore, a central filing system, as proposed by Appellees, would not require any indication on the face of a campaign allegation that would allow a voter or reader to tell whether it is in compliance. This lack of capacity for voter recognition of compliance would defeat one of the significant benefits of Article 14.10(b). Finally, such a system would require the government to set up warehouses for the storage of every item of campaign advertising and to pay for themaintenance, classification, indexing, retrieval and replacement of each such item.

(3) The suggestion that the State could make "misleading" campaign advertising illegal rather than disclosing its source and letting the voter decide.

Appellees have also advanced the argument that Article 14.10 should be replaced by a criminal libel law or other statute designed to prevent false statements in elections. The answer to this suggestion is that a criminal law against "false" statements in elections would be a severe danger to the First Amendment. It would cause can-

didates to censor their speech out of caution lest their remarks be deemed "falsehoods," "misrepresentations," or "libel," and it would be subject to abuse in a way undreamt of for Article 14.10(b).

Texas repealed its criminal libel law effective January 1, 1974. The repeal was considered at the time to be progressive and enlightened. The prior law made it easy for an incumbent politician to use prosecutions to stifle opposition by causing charges to be brought in marginal cases.

There is another reason Texas should not be required to rely solely upon "anti-falsehood" laws in the election context, and that is that they would not be effective to stop dirty tricks or the other evils to which Article 14.10(b) is directed. First, an anti-falsehood law applied to candidates for public office could only be constitutional if limited to statements made with actual malice or reckless disregard of the truth. New York Times v. Sullivan, 376 U.S. 254 (1964), carried forward by Gertz v. Robert Welch, Inc., 42 U.S.L.W. 5123 (1974). Furthermore, the public would not be given any information during an election by an anti-falsehood law; all such a law would do would be allow prosecution of the perpetrator of the falsehood, after the fact, if he could be apprehended. Worst of all, many dirty tricks can be carried off without any affirmative misrepresentation and would be extremely difficult to cover by libel legislation. United States v. Insco, supra, is a case in point. Republican congressional candidate Insco flooded his district with bumper stickers reading "McGOVERN-GUNTHER," thus linking his Democratic opponent, Gunther, with the Democratic presidential candidate, who was unpopular in the district. There was nothing "false" about the stickers themselves; what was "dirty" about them was that readers

would naturally assume that Democrat Gunther, rather than Republican Insco, was behind them. Donald Segretti's advertisements were not affirmatively "false" either. A law against libel or falsehood would do nothing to stop such conduct.

(4) The suggestion that only the name of the purchaser of the advertising, and not that of the printer, be required to be disclosed.

It has also been suggested that the statute should be rewritten to require only disclosure of the "person paying" for the advertising, and that the printer be omitted. Actually, before 1973 the purchaser of the advertising was all that Texas law required disclosed. Article 14.10(b) was amended in 1973 to include a requirement for designation of the printer. The reason for the amendment was that without printer identification the statute was almost totally ineffective at stopping or detecting falsely attributed smears and other types of dirty-trick campaign literature.

Affidavits in the record of State investigators Randall Wood and John Roy Henderson document the failure of the prior law. Without printer designation, all that a smeared candidate could produce would be a piece of literature with a campaign charge about him. Lack of a requirement of printer

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*Insco did, in fact, proceed to compound the tactic by publicly charging that Gunther was behind the stickers, but such a statement would not have been necessary to the functioning of the dirty trick. Insco was convicted not under a libel law but under 18 U.S.C. §612, the federal counterpart to Article 14.10(b). United States v. Insco, supra.

designation made it impossible even to determine or prove with any assurance whether the smear was falsely attributed. Unable to locate a printer through whom to trace the literature, investigators were like climbers unable to reach the first rung of a ladder; without the printer's name and address, it was not possible to utilize the requirement that a signed copy be retained by the printer for investigation.

AmendedArticle 14.10(b) provides a way whereby a candidate can, with reasonable assurance of accuracy, do one of two things: (1) trace the advertising to its source, or (2) demonstrate that it does not comply with the law and is therefore deserving of a lesser degree of belief. These things can be done quickly enough to allow an answer during the election. Without printer designation and retention of the signed copy for inspection, these steps would not be possible.

The suggestion that the printer be omitted, therefore, amounts to a suggestion that the State of Texas could have passed a law that would be less efficacious in protecting the governmental interests involved. In Branzburg v. Haynes, supra, this Court was faced with a similar argument, to the effect that a grand jury ought to be disallowed from calling newspersons to testify if the grand jury could get by without their testimony. This Court held that there was no requirement that the grand jury curtail its requests for information and thereby have a less effective investigation. 408 U.S. at 701. Similarly, Texas should not be required to sacrifice its disclosure requirements and have a statute here that would be ineffective to combat dirty tricks.

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It is important in considering these counterproposals of Appellees to recognize

that Article 14.10(b) does not stop, censor or curtail any speech or relationship of association. The cases widely recognize the right of the States to enact reasonable regulations of the "time, place and manner" of speech in appropriate cases, and indeed in the election context the United States Constitution expressly provides that the States have such authority. Article 14.10(b) has no more effect than any other reasonable regulation fitting within the time, place and manner category. Texas should not be required to adopt ineffective or oppressive laws when the aim is fair election. Comparison with Appellees' counterproposals shows that the Texas legislature has actually exercised good judgment in choosing among the alternatives.

IV. ARTICLE 14.10(b) IS MORE THAN APPROPRIATELY SPECIFIC WHEN CONSIDERED IN LIGHT OF THE CONTROLLING CASES, AND APPELLEES' "VAGUENESS" ARGUMENT IS LACKING IN MERIT.

Appellees cite Connally v. Gen. Constr. Co., 269 U.S. 385 (1925), in their Complaint as indicating that Article 14.10(b) is unconstitutionally vague. Complaint, paragraph 8(a). Connally holds that a statute is void for vagueness if persons of ordinary intelligence would have to "guess" at its meaning. It is submitted that Article 14.10(b) more than meets this requirement.

In United States Civil Serv. Comm'n v. Letter Carriers, 41 U.S.L.W. 5122 (1973), this Court upheld the Hatch Act against a similar vagueness attack. The words of Article 14.10(b)--"printer or publisher" and "person paying for the advertising"--are far more specific than the Hatch Act's use of such terms as "active part" in campaigns

or political "management." In Letter Carriers, this Court recognized that there are limitations on the specificity of language and therefore with any statute a skeptic can postulate marginal situations that can be called vague. But Letter Carriers indicates that the legislature is entitled to assume that persons subject to the statute will exercise "common sense" in their effort to comply with the law.

In this case, the Appellees' vagueness claims are not directed at the traditional vagueness concept of a statute without standards, and Article 14.10(b) cannot be asserted to have the profound defects that a universal vagrancy or disturbing-the-peace law might exhibit. Those statutes, unlike Article 14.10 (b) give police officers license to arrest anyone. Rather, the argument against 14.10(b) is thatAppellees read it so as to allow more than one way to comply. It is submitted that thismultiplicity read into the statute is not the product of reasonable construction, but even if there were more than one reasonable way to comply with the statute, that fact would not render the statute impermissibly vague. Compliance in any reasonable way would have to be deemed sufficient, and the government could not successfully prosecute unless it could negate the claim of compliance in each ofthe reasonable ways in which the statute could be read. This is the square holding of United States v. Vuitch, 402 U.S. 62 (1971). Thus under Vuitch, Appellees' argument that Article 14.10(b) allows them to identify "advertising agencies, individual advertising agents, political committees, their chairmen or some other individuals or agencies" as the "person paying," even if meritorious, would not render the statute void for vagueness, but would simply allow compliance by the placing of any one of the names that could reasonably be read as com-

plying.

Article 14.10(b) should be compared with 18 U.S.C. §612, its federal counterpart. Section 612, which has been in effect since the early 1950's, requires identification of theperson "responsible" for election advertising. This statute, although arguably less specific than Article 14.10(b), has functioned smoothly since enactment. There is no reported case asserting its vagueness. Federal candidates and their printers have had no difficulties complying with it. A candidate or printer using common sense and trying to comply would not have difficulty with 14.10(b) either.

Furthermore, Appellees are protected not only by the Vuitch construction principle but also by the construction placed on the statute by the Attorney General in this case. Vernon's Tex. Pen. Code Ann. Art. 8.03 provides an absolute defense to prosecutionfor any one who reasonably relies upon a written interpretation of the law by a responsible state officer. The Attorney General, acting for himself and the Secretary of State, has here written a brief explaining Article 14.10(b) in response to Appellees' claims of vagueness. Anyone following this interpretation would ipso facto be in compliance with the law.

CONCLUSION

Article 14.10(b) performs crucial functions in assuring fair elections and is unquestionably related in a reasonably way to the advancement of a compelling state interest. It is not vague or overbroad. It does not stop, censor, or abridge the right of speech or association; it is simply a reasonable, limited "time, place and manner" law. All it does is ask a "modicum of information" about the financing of com-

munications that determine who will govern in this democracy. It is respectfully urged that the judgment of the district court declaring Article 14.10(b) unconstitutional and enjoining its enforcement should be reversed.

Respectfully submitted,

DAVID CRUMP
2018 Timber Lane
Houston, Texas 77027

FRANK G. WALTERMIRE
2480 Two Shell Plaza
Houston, Texas 77002

Attorneys for Common Cause

CERTIFICATE OF SERVICE

I, David Crump, as counsel for Amicus Curiae Common Cause, hereby certify that true and correct copies of the foregoing Motion and Brief have been served on opposing counsel named below by placement in the United States mail, postage prepaid, on this the _____ day of _____, 1975.

Ms. Elizabeth Levatino
Asst. Atty General
Capitol Station
Austin, Texas 78711

Ms. Mary Joe Carroll
P. O. Box 1148
Austin, Texas 78767

Mr. Joe Moss
Asst. District Atty
301 San Jacinto
Houston, Texas 77002

Mr. Leon Hirsch
711 Fannin, Suite 777
Houston, Texas 77002

Mr. Gerald Birnberg
5959 West Loop South
Bellaire, Texas 77401

DAVID CRUMP